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83-2055

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN RE

C. ITOH & COMPANY (AMERICA) INC.,

Petitioner

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals has failed to obey the prior mandate of the Supreme Court to reconsider this case in light of *Sumitomo Shoji America, Inc.* v. *Avagliano?*

2. Whether the Court of Appeals improperly refused to exercise jurisdiction over this appeal, in light of the Supreme Court's earlier order of remand?

RULE 28.1 DESIGNATION

C. Itoh & Co. Ltd. (Japan) is the parent corporation of Petitioner, C. Itoh & Company (America) Inc.

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No. .....

In The

Supreme Court of the United States

October Term, 1983

In Re

C. Itoh & Company (America) Inc.,

Petitioner

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

C. Itoh & Co. (America) Inc. (hereinafter referred to as "C. Itoh" or "Petitioner"),[1] respectfully prays that a writ of mandamus be issued to the United States Court of Appeals for the Fifth Circuit requiring that court to exercise its jurisdiction over this appeal and to carry out the prior mandate of the Supreme Court remanding the case "for further consideration in light of *Sumitomo Shoji America, Inc.* v. *Avagliano.*"

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 725 F.2d 970 (5th Cir. 1984) (Appendix A, reprinted in the separate Appendix). The order of the district court is not officially reported but is reprinted herein (App. B). The order of the Court of Appeals on remand from the Supreme Court is reported at 687 F.2d 129 (5th Cir. 1983) (App. C). The order of the Supreme Court granting certiorari and remanding the case for

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[1] C. Itoh is the Defendant in this case. The Respondents are Plaintiffs Michael E. Spiess, Jack K. Hardy, and Benjamin F. Rountree. Other respondents to this petition are the Honorable Albert Tate, Jr., William L. Garwood, and Patrick E. Higginbotham, who were members of the motions panel of the Court of Appeals which dismissed this appeal.

further consideration is reported at 457 U.S. 1128 (1982) (App. D). The earlier opinion of the Court of Appeals is reported at 643 F.2d 353 (5th Cir. 1981) (App. E). The initial opinion of the District Court is reported at 469 F.Supp. 1 (S.D. Tex. 1979) (App. F).

JURISDICTION

The judgment of the Court of Appeals was entered on February 10, 1984. A Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on March 8, 1984 (App. G). The jurisdiction of this Court is invoked pursuant to the All Writs Act, 28 U.S.C. § 1651 (1976).

TREATY AND STATUTES INVOLVED

This case involves the Treaty of Friendship, Commerce & Navigation between the United States and Japan, [1953] 4 U.S.T. 2063, T.I.A.S. No. 2863 (hereinafter referred to as the "Treaty"); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976) (hereinafter referred to as "Title VII"); 42 U.S.C. § 1981 (1976) (hereinafter referred to as "Section 1981"); and the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.* (1976). Relevant portions of the Treaty and the statutes are reprinted in Appendix H.

STATEMENT OF THE CASE

1. Legal and Factual Background.

The 1953 Treaty of Friendship, Commerce & Navigation between the United States and Japan establishes the basic framework for economic and trade relations between these two countries. Among the most important rights conferred by this Treaty is the staffing privilege contained in Article VIII(1):

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice*.

4 U.S.T. at 2070 (emphasis supplied). Article VIII(1) is the corollary to the fundamental right of Japanese corporations to organize, manage and control enterprises they have established or acquired in the United States, which is guaranteed by Article VII(1) of the Treaty.

This Treaty right of freedom of choice in the selection of managerial personnel abroad facilitates home office control of foreign investments and operations. It also fosters international commerce by eliminating the artificial barriers sometimes created by so-called "percentile" legislation, that is laws requiring the employment of local nationals in foreign-owned businesses. These provisions were included in the Treaty at the insistence of the United States in order to benefit American companies doing business abroad. See *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 181 n. 6 (1982).

The staffing rights of Article VIII are effectuated through Article I of the Treaty and Section 101(a)(15)(E) of the Immigration and Nationality Act, which permit the immigration into the United States of managerial personnel (termed "treaty traders" or "treaty investors") for the purpose of carrying on trade and engaging in related commercial activities between the two countries.

C. Itoh & Co. Ltd. is a Japanese general trading company ("sogo shosha") engaged in substantial international trade between the United States and Japan. Operating under the protection of these Treaty rights, C. Itoh & Co. Ltd. ("C. Itoh Japan") manages and controls its wholly owned subsidiary C. Itoh & Co. (America) Inc., a New York corporation. C. Itoh's principal commercial activity involves arranging for the import to the United States of Japanese produced goods and services and the export to Japan of United States produced goods and services. Through its knowledge of the nature and needs of Japanese business, C. Itoh seeks to represent Japanese industry involved in trade between Japan and the United States.

C. Itoh is one of numerous subsidiaries and affiliates throughout the world controlled by C. Itoh Japan. C. Itoh functions as one component of a global trading system coordinated by its parent corporation in Tokyo.

This world-wide integration of operations is achieved through the assignment of Japanese nationals from the parent company to its overseas subsidiaries and affiliates for purposes of management and control. Thus, C. Itoh's managerial structure is composed largely of C. Itoh Japan employees assigned to C. Itoh by the parent company for a limited period of time. These "Japan staff" personnel enter the United States as non-immigrant "treaty traders" under the provisions of the Immigration and Nationality Act of 1952. 8 U.S.C. § 1101(a)(15)(E)(i) (1976). As a general rule, C. Itoh's Japanese managerial personnel remain in the United States for periods of between three and five years before returning to Japan to resume duties with the parent company. C. Itoh Japan's practice of rotating its Japan staff is similar to that of other Japanese trading companies operating in the United States, such as Sumitomo.

2. **Course of Proceedings Below.**

This is an employment discrimination class action suit brought pursuant to Title VII Section 1981. Plaintiffs are white American citizens alleging discrimination by C. Itoh in the staffing of its management level positions with Japanese nationals and the exclusion of Plaintiffs from those management positions. More specifically, Plaintiffs claim that C. Itoh has violated Title VII and Section 1981 by its failure to train and promote them to management level positions and its failure to provide them with management level compensation and other terms and conditions of employment. A nationwide class of past, present and future employees who are non-Oriental, non-yellow color, and non-Japanese has been certified.

Defendant moved under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint for failure to state a

claim upon which relief can be granted, relying on the protection of the 1953 FCN Treaty, particularly the staffing privileges contained in Article VIII(1). The district court denied this Motion to Dismiss, concluding that C. Itoh was a company of the United States, not of Japan, under the definition contained in Article XXII(3) of the Treaty, and hence could not avail itself of the rights provided by Article VIII(1), notwithstanding that it was the wholly owned subsidiary of an admittedly Japanese company. *Spiess* v. *C. Itoh & Co. (America), Inc.*, 469 F.Supp. 1 (S.D. Tex. 1979) (App. F). The district court also ruled that, even if C. Itoh had standing to raise the Treaty rights of its parent, a question which it did not reach, this would not provide a defense since the hiring practices at issue were those of C. Itoh and not those of the parent company. Recognizing the novelty and importance of the issues presented, however, the district court certified the case for interlocutory appeal to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1292(b) (1976).

The Fifth Circuit accepted the appeal and reversed, holding that C. Itoh was a company of Japan under the Treaty and entitled to assert in its own behalf all Treaty rights granted to such companies, including those of Article VIII(1). On the substantive issue whether Title VII or Section 1981 had abrogated the unqualified Treaty right of Japanese companies to engage managerial personnel "of their choice," the Court of Appeals concluded that Article VIII(1) of the Treaty conferred an absolute employment right:

> It is apparent that article VIII(1)'s "of their choice" provision was intended, not to guarantee national treatment, but to create an absolute rule permitting foreign nationals to control their overseas investments. . . . Considering the Treaty as a whole, the only reasonable interpretation is that article VIII(1) means exactly what it says: Companies have a right to decide which executives and

> technicians will manage their investment in the host country, without regard to host country laws.

643 F.2d at 360-61 (App. E).

According to the Fifth Circuit, Article VIII(1) was "based on the principle of home office control of the foreign investment." *Id.* at 362 n. 8. The reciprocal obligations found in Article VIII were designed to preclude any local legislation that might interfere with this principle of home office control:

> Clearly, Article VIII(1) provides some right to Japanese companies to manage their own affairs. It is irrelevant whether the source of potential interference with that right is state legislation characterized as "ultranationalistic" or a federal statute labeled "progressive." *The right of Japanese companies to choose essential personnel is a right to maintain Japanese control of their overseas investment.* To make this right subject to Title VII's bfoq requirements, or to interpret it to override only state law, would render its inclusion in the Treaty virtually meaningless. Thus, we hold that the Article VIII(1) "of their choice" provision permits Japanese companies to discriminate in favor of their fellow citizens.

Id. at 362 (emphasis supplied). Since the Fifth Circuit held that C. Itoh was entitled to assert, in its own right, the protection of Article VIII(1), that court did not reach the issues of whether C. Itoh had standing to raise the Treaty rights of its parent, whether the parent's Treaty rights extended to staffing of the subsidiary, or whether the challenged employment practices were those of the parent or the subsidiary. The Fifth Circuit accordingly reversed and remanded the case to the district court with directions to dismiss.

Subsequently, this Court held that a corporation incorporated in the United States was not a company of Japan under the Treaty and was not entitled to assert in its own right the protection of Article VIII(1) in defense to a Title VII suit, notwithstanding it was the wholly owned subsidiary of an admittedly

Japanese company. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176 (1982). This Court's decision was extremely narrow, however. It did not resolve the question of the impact of Title VII on Treaty-based staffing privileges, nor did it preclude the possibility that subsidiaries of Japanese companies could assert Treaty rights on behalf of their parent companies. In a footnote, this Court observed, "We also express no view as to whether Sumitomo [the defendant subsidiary] may assert any Article VIII(1) rights of its parent." *Id.* at 189 n. 19.

Thereafter, this Court granted the Plaintiffs' petition for certiorari in this case, vacated the judgment of the Fifth Circuit and remanded the case to the Fifth Circuit "for further consideration in light of *Sumitomo Shoji America, Inc.* v. *Avagliano*. . . ." *Spiess* v. *C. Itoh & Co. (America) Inc.*, 457 U.S. 1128 (1982) (App. D).

Following this Court's remand, the Fifth Circuit reopened the appeal and directed the parties to file memoranda regarding further action necessary to comply with this Court's mandate. Both parties urged the Court of Appeals to consider the remaining issues in the Motion to Dismiss which were left open by this Court in *Sumitomo*. However, the Fifth Circuit declined to do so without first remanding the matter to the district court for further factual findings. The pertinent portion of the Fifth Circuit's order states:

> The parties urge this court to consider the remaining issues in the case. We decline to do so without first remanding the matter to the district court.
>
> C. Itoh presents several grounds for its Motion to Dismiss. For example, it argues that it has standing to assert the substantive Treaty rights of its parent company. Resolution of these remaining issues may involve several factual determinations that have not yet been made. Therefore, we have determined that no decision should be made by this court at this time. We remand the cause to the district court

> with directions to conduct further proceedings to finalize the action in light of the mandate of the Supreme Court.

687 F.2d 129 (5th Cir. 1983) (App. C).

The district court on remand refused to make any further factual findings. Instead, that court simply referred to its initial decision (469 F.Supp. 1) and held that since C. Itoh could not assert Treaty rights directly in its own behalf, it could not assert Treaty rights indirectly by invoking the Treaty rights of its parent. Thus, the district court ruled as a matter of law that C. Itoh had no standing to claim the protection of Article VIII(1) on behalf of its parent company. The district court entered its order denying C. Itoh's Motion to Dismiss in its entirety on September 27, 1983 (App. B).

C. Itoh thereafter sought to bring its Motion to Dismiss before the Fifth Circuit in order that that court could fulfill its mandate from this Court to reconsider the case. Instead of carrying out this Court's instructions, however, a motions panel of the Fifth Circuit *sua sponte* dismissed the appeal for want of jurisdiction. 725 F.2d 970 (1984) (App. A).

In its opinion the Fifth Circuit panel briefly discussed and rejected C. Itoh's assertion of the court's continued jurisdiction by virtue of the earlier appellate proceedings in the case. The motions panel acknowledged, however, that they had "difficulty in understanding just what particular legal theory of appealability appellant intends to advance thereby." 725 F.2d at 975. This was not surprising, inasmuch as the panel was ruling on an issue which none of the parties had contested and which neither side had been requested or given the opportunity to brief. Moreover, none of the judges on the motions panel had participated in the earlier decision on the merits or in the decision to remand following this Court's action.

The Fifth Circuit panel also considered and rejected C. Itoh's alternative jurisdictional argument grounded on the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337

U.S. 541 (1949). C. Itoh's Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied by the Court of Appeals on March 8, 1984 (App. G).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Has Failed to Obey the Mandate of the Supreme Court.

On June 21, 1982, this Court granted certiorari in this case, and issued the following order:

> The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Sumitomo Shoji America, Inc.* v. *Avagliano.*

Spiess v. *C. Itoh & Co. (America), Inc.*, 457 U.S. 1128 (1982). The *Sumitomo* case, involving substantially similar facts, was decided by this Court after the Fifth Circuit had issued its decision upholding C. Itoh's position on the Treaty, and while the Plaintiffs' Petition for Writ of Certiorari was pending before this Court. In *Sumitomo*, this Court held that a company incorporated in the United States was not a company of Japan under the Treaty and therefore was not entitled to assert *in its own behalf* the protection of Treaty article VIII(1), notwithstanding it was the wholly-owned subsidiary of a Japanese company.

While this conclusion is contrary to that previously reached by the Fifth Circuit, it did not dispose of all the issues presented in C. Itoh's Motion to Dismiss, nor did it require or suggest that the Fifth Circuit reverse its earlier judgment in favor of C. Itoh. As noted previously, the *Sumitomo* opinion expressly refused to decide the question of the subsidiary's standing to assert the Treaty rights of its parent company. *Sumitomo, supra*, 457 U.S. at 189 n. 19. Nor did this Court reach the issue of whether the staffing rights conferred by the Treaty could be overridden or diminished by subsequent American employment discrimination laws such as Title VII.

Inasmuch as the court of appeals has already determined the latter question in favor of the Treaty, the principal issue for further consideration by that court was the ability of C. Itoh to assert its parent company's Treaty rights. This issue had been originally raised in C. Itoh's Motion to Dismiss but was not previously decided by the Court of Appeals in view of its holding on the corporate nationality issue. Thus, there was an alternative legal theory upon which the Fifth Circuit's previous decision in favor of C. Itoh could have been sustained, a theory which had been presented to the court of appeals before the *Sumitomo* opinion had been rendered. It has generally been recognized that, once a case has been remanded for further consideration in light of an intervening Supreme Court decision, a court of appeals is obligated to consider not only the direct impact of the intervening decision upon its prior holdings, but also whether its earlier decision might be sustained on alternative grounds not affected by this Supreme Court decision. *Sanders* v. *John Nuveen & Co.*, 555 F.2d 790 (5th Cir. 1977).

Contrary to the plain instructions of this Court, however, the Fifth Circuit did not reconsider the case in light of *Sumitomo*. Instead, the court of appeals remanded the cause to the district court for further proceedings. The pertinent part of the court's Order reads:

> The parties urge this court to consider the remaining issues in the case. We decline to do so without first remanding the matter to the district court.
>
> C. Itoh presents grounds for its motion to dismiss. For example, it argues that it has standing to assert the substantive treaty rights of its parent company. Resolution of these remaining issues may involve several factual determinations that have not yet been made. Therefore, we have determined that no decision should be made by this court at this time. We remand the cause to the district court with directions to conduct further proceedings to finalize the action in light of the mandate of the Supreme Court.

687 F.2d 129 (5th Cir. 1983).

While the court's Order did not expressly recite that its jurisdiction would be retained pending the district court's action, this intention was clear from the language of the Order.[2] The court declined to consider the remaining issues "without *first* remanding the matter to the district court." *Id.* (emphasis supplied). Since additional factual findings might be necessary to resolve those issues, the court "determined that no decision should be made by this court at this time." *Id.* (emphasis supplied). Finally, the directions to the district court "to conduct further proceedings to finalize the action *in light of the mandate of the Supreme Court*" make clear that such proceedings were to be aimed at carrying out this Court's mandate — *i.e.* further consideration in light of *Sumitomo*. Thus, the nature of the remand by the court of appeals to the district court was both limited and provisional, and, as such, was consistent with accepted appellate procedure where supplementation of the record is necessary. *See, e.g., Sanchez* v. *Dallas Morning News*, 543 F.2d 556 (5th Cir. 1976); *United States* v. *Hand*, 472 F.2d 162, 163 n. 2 (5th Cir. 1973).

On remand the district court declined to make any such additional findings. That court merely affirmed its initial ruling, holding as a matter of law that C. Itoh was not entitled to assert the Treaty rights admittedly possessed by its parent, a Japanese company. *See* App. B. C. Itoh then promptly appealed this decision in order that the Fifth Circuit could carry out this Court's instructions to reconsider the case.

Instead of fulfilling the mandate, however, a motions panel of the Fifth Circuit *sua sponte* dismissed the appeal for want of jurisdiction. 725 F.2d 970 (1984). As noted previously, none of the parties had contested the jurisdiction of the court of appeals, nor was either side permitted to brief the jurisdictional issue prior to the panel's ruling. None of the members of the motions

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[2] Indeed, any other intention would have been directly contrary to this Court's mandate.

panel had participated in the earlier decision on the merits or in the decision to remand following this Court's action.

By its two orders subsequent to the remand from this Court, the Fifth Circuit has improperly relinquished and refused to exercise jurisdiction over this case. In so doing, the Fifth Circuit has disregarded the clear mandate of the Supreme Court.

After this Court issues its mandate, a lower court must insure that it is scrupulously and fully carried out. *United States* v. *E. I. du Pont de Nemours and Co.*, 366 U.S. 316, 325 (1961); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). The inferior court has no power or authority to alter or deviate from the mandate issued by an appellate court. *Briggs* v. *Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948); *West* v. *Brashear*, *39 U.S. 51 (1840)*; *Sibbald* v. *United States*, 37 U.S. 488 (1838). The rationale for this rule was succinctly stated by the Supreme Court in *Tyler* v. *Magwire*, 84 U.S. (17 Wall.) 253 (1873), a case in which the lower court had similarly evaded the mandate of this Court by dismissing the case on remand for a supposed want of jurisdiction:

> By the directions of the mandate they [the lower court] were as much bound to proceed and dispose of the case in conformity to the opinion of this court as to reverse their former decree, but instead of that they entered a new decree dismissing the petition, which in effect evades the directions given by this court, and practically reverses the judgment and decree which the mandate directed them to execute. *Argument, to show that a subordinate court is bound to proceed in such an event and dispose of the case as directed and that they have no power either to evade or reverse the judgment of this court, is unnecessary, as any other rule would operate as a repeal of the Constitution and the laws of Congress passed to carry its judicial power into effect.*

84 U.S. at 282-83 (emphasis supplied).

Thus, the court of appeals was bound to execute the mandate of this Court, which was to give the case "further consideration

in light of *Sumitomo*." The Fifth Circuit had no warrant to inquire into its own jurisdiction after the remand from the Supreme Court:

> On receipt of the mandate it is the duty of the subordinate court to carry it into execution even though the jurisdiction do not appear in the pleadings.

Tyler v. *Magwire*, 84 U.S. at 283. *See also Skillern* v. *May*, 6 Cranch 267, 3 L.Ed. 220 (1810); *Livingston* v. *Story*, 12 Pet. 339, 9 L.Ed. 1108, 1110 (1837); *Chaires* v. *United States*, 3 How. 611, 11 L.Ed 749 (1845).

A remand from the Supreme Court itself provides the jurisdictional basis for subsequent action by a court of appeals. In fact, appellate jurisdiction is strictly limited by the terms of the remand. As the Ninth Circuit has explained:

> When a case is appealed from this Court to the Supreme Court, this Court completely loses jurisdiction of the cause. Thereafter, our jurisdiction can be revived only upon the mandate of the Supreme Court itself, and even upon such restoration, the jurisdiction of this Court is rigidly limited to those points, and those points only, specifically consigned to our consideration by the Supreme Court.
>
> In the instant case, this Court is functioning under such a remand. Consequently, our jurisdiction is strictly limited by the Supreme Court's mandate. *That mandate is our compass and our guide.*

Herrmann v. *Brownell*, 274 F.2d 842, 843 (9th Cir.), *cert. denied sub nom. Herrmann* v. *Rogers*, 364 U.S. 821 (1960) (emphasis supplied). In that case the Supreme court had remanded with instructions to reconsider a specific issue of Idaho property law, and the Ninth Circuit accordingly addressed that issue on remand.

To similar effect is *Sanders* v. *John Nuveen & Co.*, 554 F.2d 790 (7th Cir. 1977). There the Supreme Court had granted a petition for certiorari, vacated the appellate court's decision, and remanded the case for reconsideration in light of an intervening

Supreme Court decision in an analogous case. The intervening decision had effectively overturned the basis for the earlier decision by the court of appeals; but there were other possible grounds to uphold the decision, and the court of appeals ruled that it was properly within the scope of the mandate to consider these issues. In other words, a remand for "further consideration in light of ....." directs the appellate court to evaluate the effect of the intervening decision on its prior holding, including a determination whether such holding can be sustained on alternative grounds. It should be noted that a remand for further consideration in light of a recent ruling by this Court does not give rise to an implication that the earlier decree of the lower court should be reversed. *United States* v. *National Soc. of Professional Engineers*, 555 F.2d 978, 982 (D.C. Cir. 1977).

The action (or inaction) of the Fifth Circuit has effectively evaded the mandate of this Court. The Fifth Circuit has never reconsidered its earlier holding in favor of C. Itoh in order to determine whether it remains good law after *Sumitomo*. By refusing to exercise its jurisdiction, the Fifth Circuit has acted as though the Supreme Court had reversed on the merits and remanded the case to the district court for trial. *Compare, e.g., Van Dusen* v. *Barrack*, 376 U.S. 612 (1964) (case remanded directly to the district court after decision reversing the court of appeals).

That is precisely what this Court did *not* do in this case. Far from ruling on the merits, the Supreme Court sent the case to the court of appeals to have the benefit of that court's analysis of the impact of *Sumitomo*, if any, on its earlier opinion. Unless and until this task is carried out, the Fifth Circuit remains in direct disobedience of the instructions of this Court.

II. Mandamus is the Appropriate Remedy to Secure Compliance with the Supreme Court's Mandate.

The writ of mandamus is one of the extraordinary writs authorized by the All Writs Act, 28 U.S.C. § 1651 (1976).

Mandamus is a discretionary remedy reserved for "really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 260 (1947). According to the Rules of the Supreme Court, the writ of mandamus may be issued where the following elements have been shown:

> that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court.

Supreme Court Rule 26.

Several types of cases have repeatedly been recognized as appropriate for the writ of mandamus. One of the most common is the situation in which a lower court has failed to act on a case properly within its jurisdiction. *See, e.g., Ex parte Republic of Peru*, 318 U.S. 578 (1943); *Ex parte Harley-Davidson Motor Co.*, 259 U.S. 414 (1922); *Ex parte Parker*, 120 U.S. 737 (1889); *Knickerbocker Ins. Co.* v. *Comstock*, 16 Wall. 258, 21 L.Ed. 493 (1873). As this Court has declared:

> The right of mandamus lies . . . where an inferior court refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise.

Ex parte Parker, 131 U.S. 221 (1889). As discussed more fully above, the instant case is a prime example of a lower federal court refusing to exercise jurisdiction over a case properly before it.

Mandamus has also traditionally been invoked to compel a lower court to comply with an earlier Supreme Court mandate in the case. *See, e.g., Vendo Co.* v. *Lektro-Vend Corp.*, 434 U.S. 425 (1978); *In re Sanford Fork & Tool Co.*, 160 U.S. 247

(1895); *Gaines* v. *Caldwell (Gaines* v. *Rugg),* 148 U.S. 228 (1893). In the words of the Court:

> [I]f a lower court "mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its actions may be controlled . . . by a writ of mandamus to execute the mandate of this court." *In re Sanford Fork & Tool Co.,* 160 U.S. 247 (1895).

General Atomic Co. v. *Felter,* 436 U.S. 493, 497 (1978).

In *Gaines* v. *Rugg, supra,* for example, the Supreme Court granted an application for writ of mandamus to compel a circuit court to obey its prior mandate. The Court's earlier decision had approved the circuit court's ruling on the title to certain land in controversy, but had disagreed with the method of accounting employed and remanded the case "for further proceedings to be had therein in conformity with the opinion of this court." *Id.* at 230. On remand the circuit court reopened the case to allow the losing party to introduce further testimony in defense of title. The Court held that such proceedings were not in conformity with its earlier mandate, and that mandamus was appropriate since obedience to the mandate and opinion "were not matters within the discretion of the circuit court." *Id.* at 238 39.

The instant appeal falls squarely within this category of cases for which the extraordinary writ of mandamus has long been held appropriate. The Fifth Circuit has unquestionably failed to execute the clear and unambiguous mandate of this Court directing further consideration in light of *Sumitomo.*

In summary, this case is "doubly" extraordinary, in that it satisfies the "extraordinary circumstances" test on two independent grounds, either of which would be sufficient in itself to warrant mandamus. The first ground is that the court of appeals has refused to exercise jurisdiction over a case which is properly before it. The second is that the court of appeals has misconstrued and evaded the direct mandate of this Court to give further consideration to the case in light of *Sumitomo.*

There can be no doubt, therefore, that a writ of mandamus is appropriate in this case.

III. Conclusion.

For all these reasons, Petitioner respectfully moves this Court to issue its writ of mandamus to the United States Court of Appeals for the Fifth Circuit directing it to carry out the previous mandate of the Court. In the alternative, Petitioner requests this Court to exercise its prerogative of supervisory mandamus and undertake for itself to decide the merits of this appeal,[3] thereby possibly conserving judicial resources and providing clear guidance to the lower courts in this unsettled area of law.

Respectfully submitted,

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[3] *See Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964).

CERTIFICATE OF SERVICE

I, Neil Martin, one of the attorneys for Petitioner C. Itoh & Company (America) Inc., do hereby certify that on this the 6th day of June 1984, three (3) copies of the foregoing Petition were placed in the United States mail, postage prepaid, to each of the following parties:

Hon. Albert Tate, Jr.
United States Court of Appeals
for the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

Hon. William L. Garwood
United States Court of Appeals
for the Fifth Circuit
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Hon. Patrick E. Higginbotham
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